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UNCITRAL and the enforceability of iMSAs: the debate heats up

Nadja Alexander (Editor), Anna Howard (Associate Editor) and Dorcas Quek Anderson

As the 65th session of the UNCITRAL Working Group II on arbitration and conciliation nears, it seems timely to reflect on the issues likely to be discussed and debated in Vienna this week.

In this post, I focus on the legitimacy of a proposed multilateral convention on the recognition and enforceability of international mediated settlement agreements (iMSAs) outlining some concerns in this regard and constructive responses to them. But first some background for the benefit of the uninitiated.

As many readers will be aware the Working Group has turned its attention to the settlement of commercial disputes and in particular on the preparation of an instrument on the enforcement of international commercial settlement agreements resulting from conciliation . (Note that in UNCITRAL speak, the term ‘conciliation’ is used interchangeably with ‘mediation’.) In terms of the type of instrument, the Working Group is considering the possibility of a convention, model provisions or guidance text. Draft provisions have been prepared without prejudice to the form of the final instrument but on the assumption that the instrument would be a stand-alone legislative text.

Previously —more than a decade ago now— the Working Group in drafting the **UNCITRAL Model Law on International Commercial Conciliation** (2002) was not able to agree on a uniform way forward for the enforcement of iMSAs. This has been one of the main criticisms of the Model Law. So it is perhaps not surprising that the issue remains controversial.

This is the first in a series of posts — written with Anna Howard and Dorcas Quek— to highlight the core concerns about the move towards a multilateral convention and the responses or counterarguments to those concerns. We focus on the legal form of a convention rather than a model law or guidance text as this focus allows us to be more specific in our comments. Moreover the notion of a multilateral convention as the instrument of choice has captured the imagination of many and seems to have encouraged the most spirited debate. If enacted it would also have the most direct impact in establishing a uniform approach to this issue.

We have placed what seem to be the main concerns about the drive towards a convention into four categories, namely concerns relating to:

1. the legitimacy of such a convention;
2. the impact of such a convention on the objectives of, and values underpinning, the mediation process;
3. the justifications for such a convention;
4. the application of an arbitration enforcement framework to iMSAs particularly in light of recent trends in arbitration.

Let me now turn to the first category of concerns, which will be the focus of the rest of this post: legitimacy of a proposed multilateral convention on the recognition and enforceability of iMSAs. It comprises two issues. The first is whether iMSAs should as a matter of principle, be accorded priority or special status vis-à-vis ordinary contracts. The second issue is whether the proposed convention compromises access to justice.

Priority being accorded to iMSAs over contracts?

The concern:

To what extent is it legitimate to grant iMSAs preferential treatment compared to other traditional contracts and unassisted negotiated agreements?

A Response:

Mediation is clearly distinguishable from unassisted negotiation as a matter of practice and of law. It is a definable and recognizable structured dispute resolution process involving an impartial third party who assists parties to:

- communicate with one another
- identify the issues in dispute between them
- explore the terrain of those issues
- generate options for resolution of the dispute
- reach an agreement in respect of the whole of, or part of, the dispute.

Around the world, regulatory regimes differentiate mediation from negotiation and other dispute resolution processes. In many jurisdictions, mediators are subject to ethical requirements, standards and accreditation. Accreditation standards are progressively international in coverage (e.g. IMI mediation certification). Furthermore, mediation is increasingly used in combination with arbitration in hybrid processes such as **Singapore's arb-med-arb**.

The growth of mediation as a dispute resolution process with its discrete procedures and standards warrants a creation of a customised cross-border enforcement regime.

Access to justice compromised?

The Concern:

The granting of special status to iMSAs in relation to their recognition and enforceability may compromise fundamental rights associated with access to justice and access to the courts.

A Response:

This concern seems to have echoes of the oft-cited and misinterpreted English case of **Halsey v Milton Keynes General NHS Trust**. The case has been cited as authority for the principle that for the State to order mediation is a breach of the right to a public trial conferred by **Article 6 of the European Convention on Human Rights**. As Tony Allen points out, not only is this inaccurate but it has **hampered the development of mediation practice** and regulation as with each new regulatory initiative, such as UNCITRAL's current talks, we are repeatedly taken down the rabbit hole of the now infamous Halsey judicial comments. The statements of the Court of Appeal in relation to this point were non-binding opinion or obiter dicta. Moreover, as Allen points out, Lord Dyson, who gave the judgement of the court in Halsey subsequently acknowledged that ordering parties to mediate in and of itself does not infringe their Article 6 rights.

How is this relevant to the current UNCITRAL deliberations? While UNCITRAL's Working Group II is dealing primarily with the enforceability of iMSAs, it is relevant for two reasons.

1. Recognition and enforceability of agreements to mediate and mediation clauses

The Working Group did consider whether the topic of recognition and enforceability of 'an agreement to submit a dispute to conciliation' should also be addressed in the proposed international instrument. The dominant view of Working Group members as reflected in the official **reports** seems to be that this topic is not needed, especially given the diverse pathways to mediation via mediation clauses, stand-alone agreements and court referrals. These comments do not provide a reason for the exclusion of agreements to mediate in a possible convention or other instrument; rather they suggest that including

them might fall into the “too hard” basket. One wonders whether the misinformed legacy of *Halsey* was also hanging heavily in the UNCITRAL meeting rooms in relation to this point — at least for some members. For others, any type of incentive or requirement to mediate, is considered to be an anathema to the voluntariness of mediation. For some civil law European jurisdictions, this is a matter of a fundamental mediation principle. For example, in Austria the extent to which the law supports the enforceability of mediation and MDR clauses is unclear and academic commentaries are divided on this point. It seems that parties to mediation clauses cannot *prima facie* enforce such contractual provisions, that is have a court order issued to the other party to require it to attend a mediation meeting.

To my mind such an approach fails to differentiate the different parts of mediation to which voluntariness can attach:

1. turning up at mediation;
2. participating in mediation;
3. reaching an agreement to resolve the dispute in mediation.

While voluntariness seems important for points 2 and 3 above, there are many examples of successful mediation practices and schemes where parties have been effectively required to turn up to mediation as a result of recognition of a mediation clause or a court referral. Even in relation to point 2 (participation in mediation) contractual provisions, institutional and legislative rules increasingly require good faith participation in mediation, a requirement which would seem to set some boundaries for voluntariness in its fullest sense.

In summary, parties do not forfeit their legal rights by entering into the mediation process. A contractual obligation to mediate typically takes the form of a condition precedent to litigation and as such parties do not lose their right to access the courts. In addition numerous statutes and institutional rules, such as Article 13 of the UNCITRAL Model Law on International Commercial Conciliation, expressly recognise that parties may need to initiate legal proceedings while mediation is on foot.

If the objective behind a convention is to promote cross-border mediation, it seems worthwhile to also examine the ways in which parties enter the mediation process, rather than confine the discussion to how parties conclude the mediation process. For instance, Maud Piers from the University of Ghent suggests that the EU might promote better access to justice by

adopting uniform rules on the legal status of an ADR clause under which parties consent to try to resolve their dispute through ADR.

2. Recognition and enforceability of iMSAs

The second reason why the legacy of Halsey may be relevant to the current UNCITRAL discussions relates to how Working Group members view Article 6 of the European Convention on Human Rights (ECHR) and similar legal rights instruments. I have heard it argued during many a spirited discussion that a convention recognising and enforcing iMSAs threatens to compromise a party's fundamental right to access the courts under the ECHR.

How can this be the case? Does this mean that numerous national laws all over the world—including within the EU—that recognise and enforce MSAs are invalid on the basis that they potentially prevent parties accessing their fundamental right of access to justice in the form of a court trial in relation to the original dispute? No, of course not.

MSAs are prima facie enforceable as ordinary contracts. In addition in many countries they can take different legal forms, which offer different levels of enforceability—a practice giving expression to mediation's flexibility and party autonomy by encouraging choice and flexibility in relation to the legal form of mediated outcomes.

Thus, depending on the jurisdiction, MSAs may take the form of ordinary contracts, settlement deeds, special mediation deeds, consent arbitral awards and/or court orders. In some jurisdictions parties may have different procedural paths to enforceability open to them.

The nature and extent of review available for MSAs depends largely on the legal form and status of the instrument containing the MSA. The grounds for challenging mediated settlements are generally more extensive in relation to standard contracts than settlement forms which involve review and ratification by professional dispute resolution practitioners such as lawyers, notaries, mediators, arbitrators and judges. This type of regulatory policy recognises that parties who seek a mediated outcome with an expedited enforcement mechanism waive the right to challenge the agreement as if it were an ordinary contract. Moreover such settlement forms are typically subject to review before they are ratified and it is arguably at this point that potential problems with, or potential challenges to, the mediated agreement should be addressed. In the absence of statutory provisions requiring a cooling-off

period or ratification by a third party, contract law will prima facie recognise and enforce such MSAs.

So back to the current UNCITRAL meetings of Working Group II. A convention to recognise and enforce iMSAs that comply with criteria set out in the convention itself would extend to international MSAs the type of regulatory provisions that already exist for domestic MSAs in many countries. Parties to an iMSA would still be able to challenge an iMSA. The relevant defences available would depend on the legal form of the iMSA and the terms of the convention.

If, as the ECHR concern suggests, parties to an iMSA would be able to litigate the original dispute about which they mediated, there would be no point at all in having a convention. It would mean, for example, that if I have a dispute with my publisher about delivery of a manuscript, and we settle the dispute using mediation, I could later have second thoughts, for no reason other than a whim, and choose to litigate the dispute. This simply goes against mediation practice and regulatory developments around the world. It also makes a farce of party autonomy as a principle that gives parties the freedom to take on contractual obligations with others, provided they do not breach public policy. Now of course if there was an allegation of fraud, misleading and deceptive conduct or another substantive contract defence to challenge the validity and legitimacy of the iMSA, then a convention should provide for the iMSA in question to be challenged in a court of law. Such an approach is in line with best practice.

Finally, it is worth noting that many countries are signatories to the NY Convention on The Recognition and Enforcement of Foreign Arbitral Awards. Accordingly these jurisdictions seem to recognize agreements to arbitrate and arbitral awards, which can only be challenged in court in limited circumstances. While arbitration is a very different process to mediation, I wonder about the reasons for effectively treating mediation less favourably.

So where to from here?

The UNCITRAL Working Group II meeting taking place during these two weeks (12-23 September) will set firm parameters for the negotiations that will inevitably follow over the coming months. Whatever choices are made, it is imperative that they are informed decisions based on solid and accurate arguments. We need something more convincing than the ECHR argument for

the purposes of the UNCITRAL discussions, especially given the enormous UN and national resources from participating countries that have poured into this proposal.

The members of UNCITRAL's Working Group II have a choice to make. Design the type of regulatory regime we want for the enforcement of cross-border mediated outcomes. Or let the current regulatory jungle continue to develop in a piecemeal and unmanaged way.

We can take charge of regulation or it can take charge of us. There is no getting away from it for there is no such thing as a regulatory vacuum.

The UNCITRAL discussions offer an opportunity for those involved to shape the future of our field and make a difference. If we don't take this chance, it may be a while before it comes around again.